

**89-1334**

No. \_\_\_\_\_

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1989

JEROME B. ROSENTHAL,

Petitioner,

vs.

J.M. YOUNG, and  
CLERK, CALIFORNIA COURT OF  
APPEAL, Second District,

Respondents.

PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF THE STATE  
OF CALIFORNIA

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PETITION FOR WRIT OF CERTIORARI

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\_\_\_\_\_ (Appendices in accompanying,  
separate Volume)

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Supreme Court, U.S.  
FILED

JAN 9 1989

JOSEPH F. SPANIOL, JR.  
CLERK

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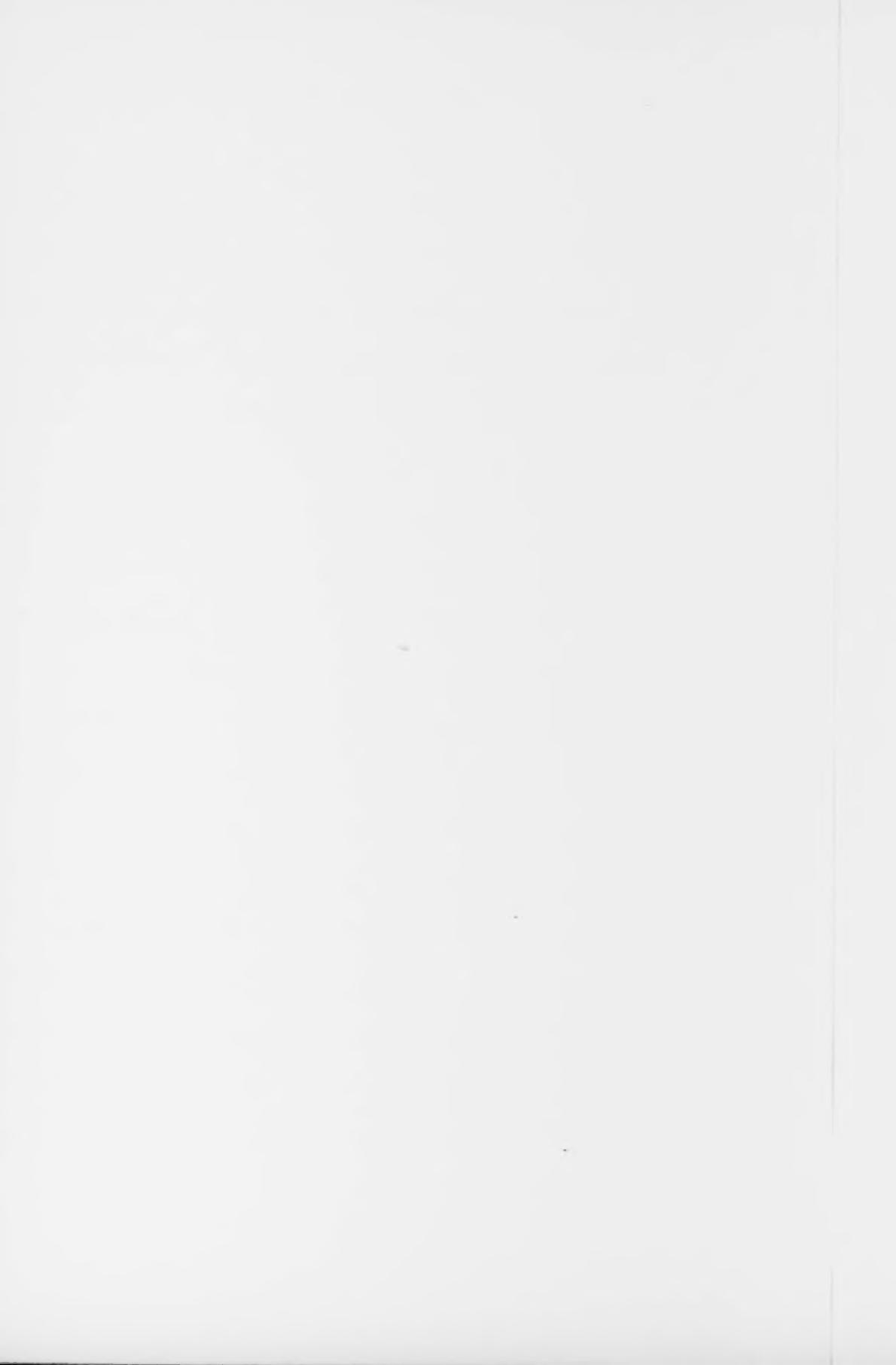


## QUESTIONS PRESENTED

1. Whether the California "no cap frivolous appeal statute" and rule [Code of Civil Procedure, Sec. 907 & California Rules of Court, Rule 26(a), respectively] are facially unconstitutional and deny 14th Amendment due process.

2. Do court awards, penalties and sanctions without the benefit of legislation infringe the 14th Amendment due process clause because of disproportionality between the size of punitive award and nature and scope of discovery infraction?

3. Whether \$20,000 ordered paid by state Court of Appeals to its Clerk in excess of statutory limit of \$1,000 (California Code of Civil Procedure, Section 1218) is a denial of equal protection of the laws under the 14th Amendment.



4. Whether California Court of Appeal's reliance on petitioner's alleged and unrelated "bad character", propensities and prior misconduct destroys the integrity of the fact-finding and decision-making processes, thus violating 14th Amendment due process clause.

5. Whether the state Court of Appeal's reversal of trial court's determination of non-liability, and Appeal Court's own initiation and imposition of liability-award against litigant, requiring litigant's monetary contribution to sanctions imposed on other party (thus creating liability, without any evidentiary hearing to determine liability or fault) is a denial of due process under the 14th Amendment.

6. Whether state discovery statute, authorizing "ultimate sanction" (loss of fundamental property right: litigant's entire case) without litigant's knowledge



of consent, and without opportunity for evidentiary hearing, is facially unconstitutional under the due process clause of the 14th Amendment.

7. Whether a civil discovery statute authorizing the taking of property requires effective assistance of counsel as guaranteed by the due process clause of the 14th Amendment, where the statute allows incompetent counsel to effectuate forfeiture the property.

8. Is litigant's choice of counsel the controlling consideration where client loses virtually all of his property and access to courts, due to ineptness of counsel, or is the judgment (thus depriving litigant of property rights and access to court rights) vitiated by reason of ineffectiveness of counsel, and thus a deprivation of rights of due process under the 14th Amendment?

9. Whether Court of Appeal's



marshalling of issues omitting the merits of the case as appealed and briefed, resulting in loss of rights of property and access to courts, is a deprivation of due process under the 14th Amendment.

10. Did the Court of Appeal exceed its jurisdiction where it predicated its determination and disposition on matters totally de hors the record, in violation of the due process clause of the 14th Amendment?

11. Whether evidentiary hearing and/or jury trial is required before imposition of sanction (taking of property) for frivolous appeal by reviewing court, as guaranteed by the 14th and 7th Amendments, respectively.

12. Do "no evidence" rules apply for purpose of due process deprivation under the 14th Amendment, where Court of Appeal, using sheer surmise and speculation, gratuitously decides, that attorney



services for client were "valuable legal services" but there is no record or evidence from which such an inference could be drawn?

13. Where plaintiff-attorney uses a strawman-assignee of his own claim, and routinely and repeatedly confines the entire case to discovery issues and pre-trial disputes; and where he "churns" and generates massive and totally disproportionate and excessive discovery documents, all to procure punitive and confiscatory awards payable to plaintiff-attorney himself, does such conduct violate petitioner's due process rights, court access rights or "day in court" rights within the 14th Amendment?



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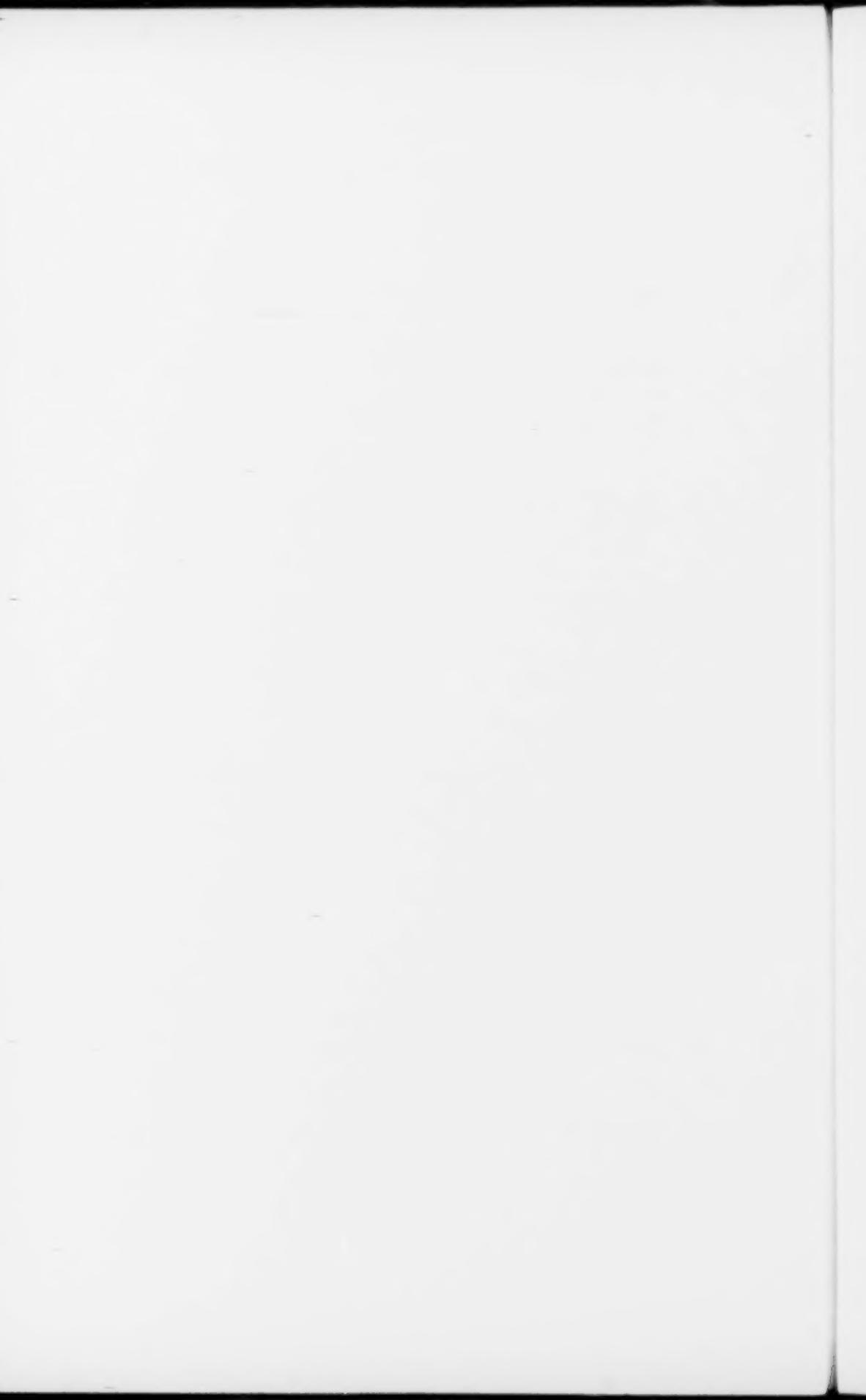


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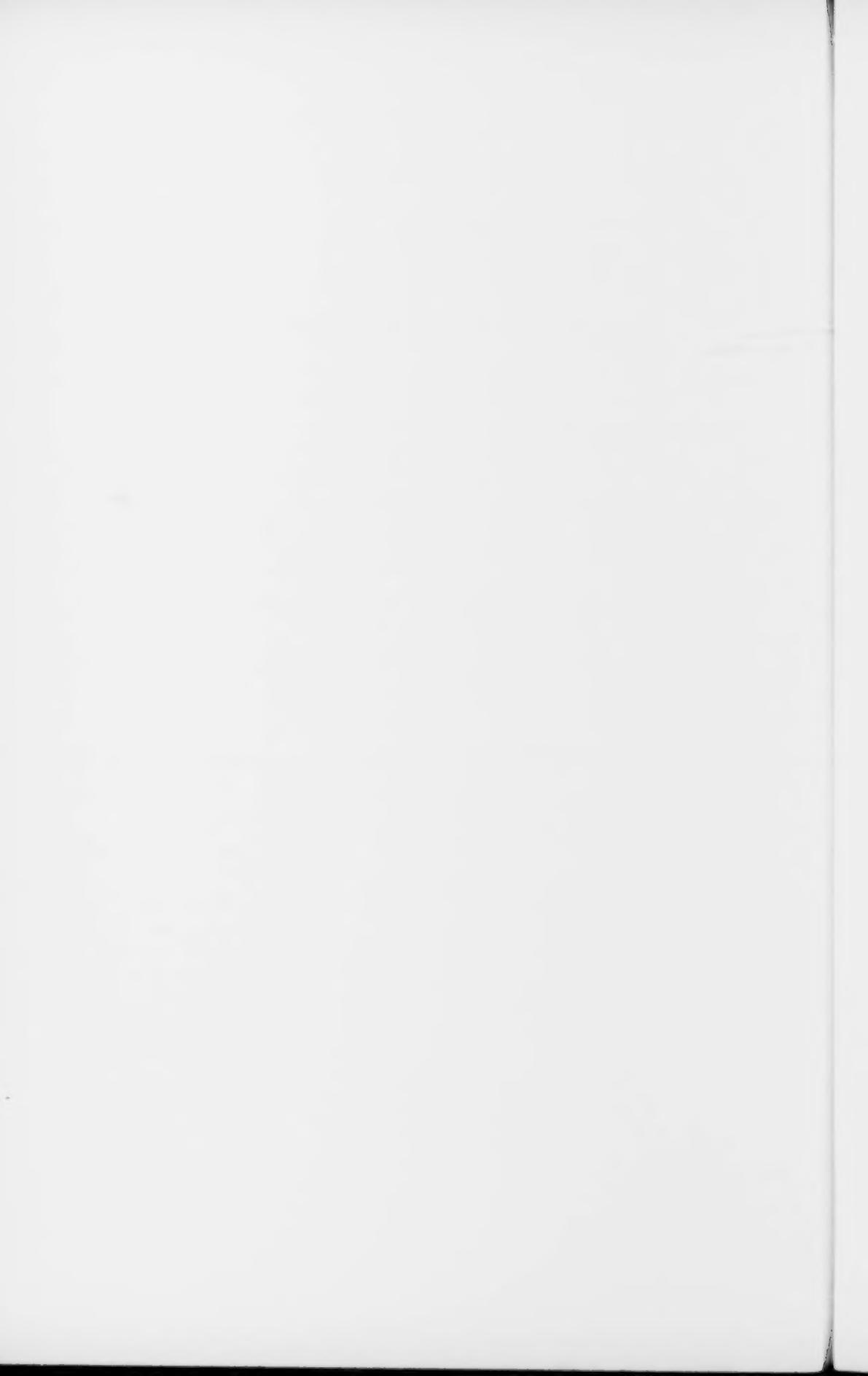


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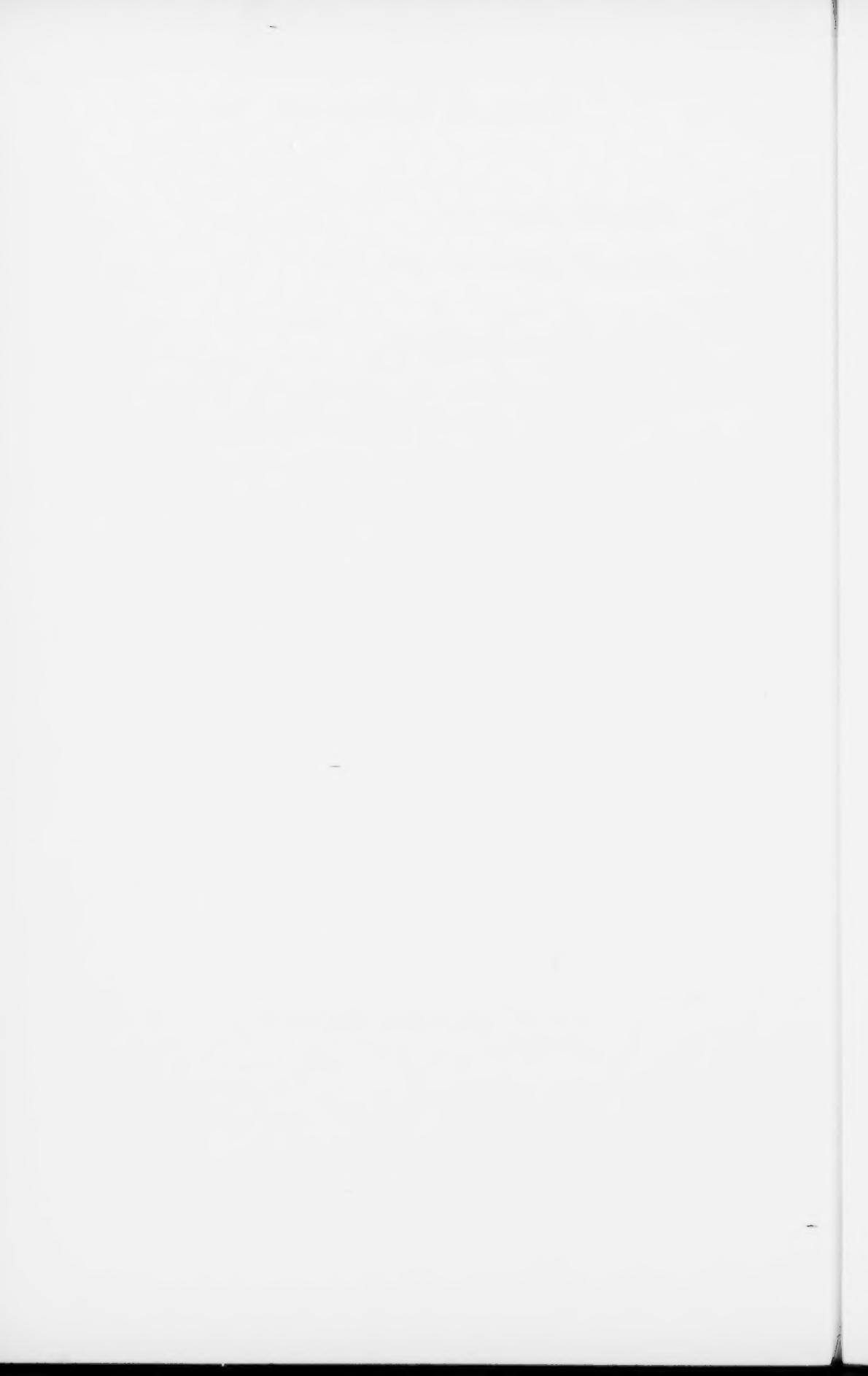


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No. \_\_\_\_\_

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PETITION FOR A WRIT OF CERTIORARI

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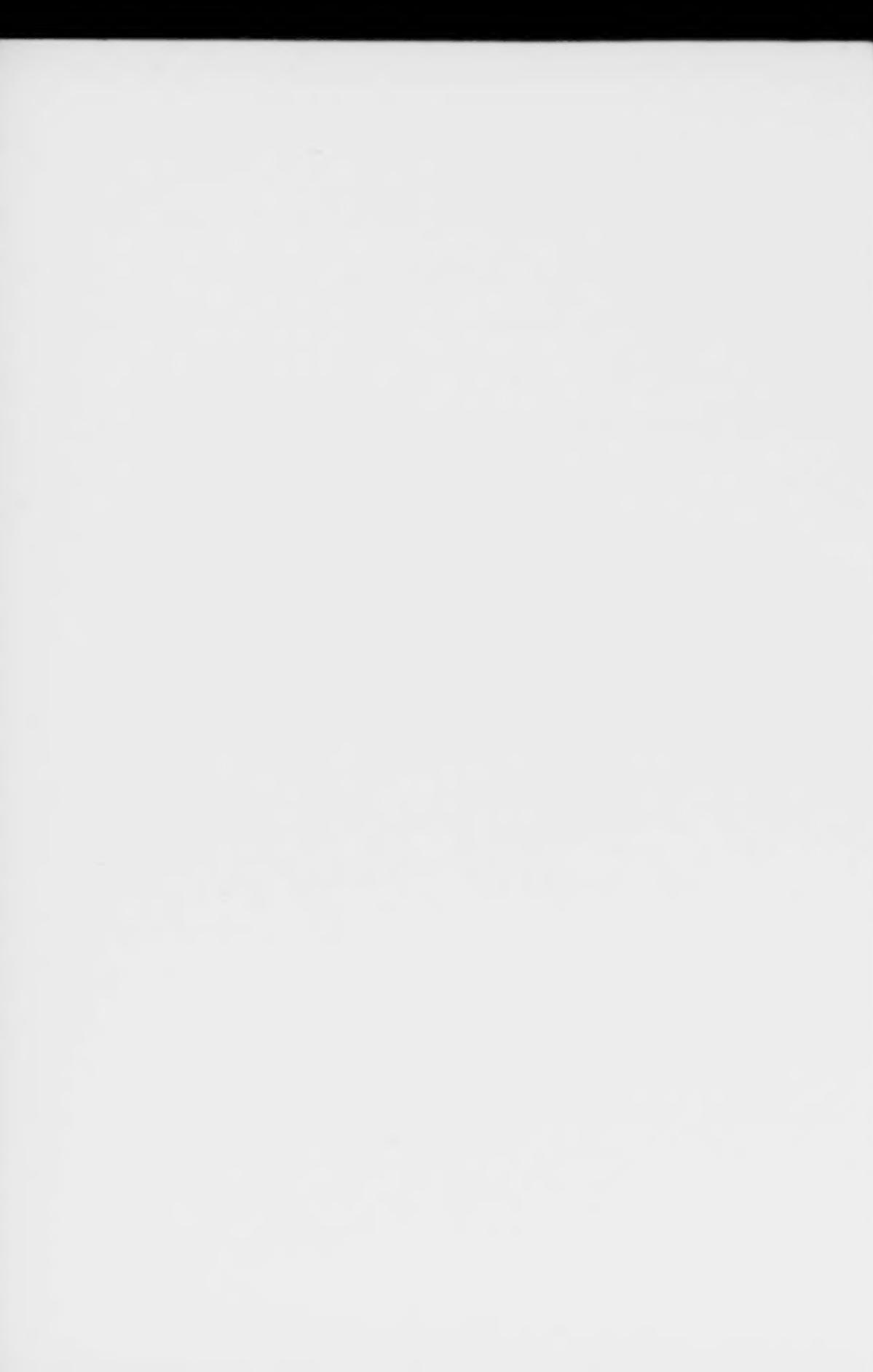
Petitioner, JEROME B. ROSENTHAL, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the California Court of Appeal, Second Appellate District, Division Three, entered in this proceeding on July 18, 1989. The California Supreme Court denied Petitioner's Petition for Review on October 11, 1989.

OPINIONS BELOW

The Opinion of the California Court of Appeal is reported in Official Reports, 212 CA3d 96. A copy of the California Supreme Court Order denying the Petition for Review is attached hereto as Appendix A.

JURISDICTION

The Judgment of the Court of Appeal



of California, Second Appellate District, Division Three, was entered on July 18, 1989 affirming judgment in the Los Angeles Superior Court against Petitioner. Thereafter, the California Supreme Court, on October 11, 1989 denied a Petition for Rehearing (Review). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISIONS,  
TREATIES, AND STATUTES WHICH  
THE CASE INVOLVES

UNITED STATES CONSTITUTION

AMENDMENT 14, SECTION 1:

"[N]or shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."



Amendment 7:

"In suits at common law, whether value and controversy shall exceed \$20.00, the right of trial by jury shall be preserved..."

STATUTES

California Code of Civil Procedure.

Section 882(b):

(b) If the judgment is based upon an obligation of one judgment debtor as surety for another and the surety satisfies the judgment or any part thereof, whether voluntarily or through enforcement procedures, the surety may compel repayment from the principal.

California Code of Civil Procedure.

Section 907: When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just.



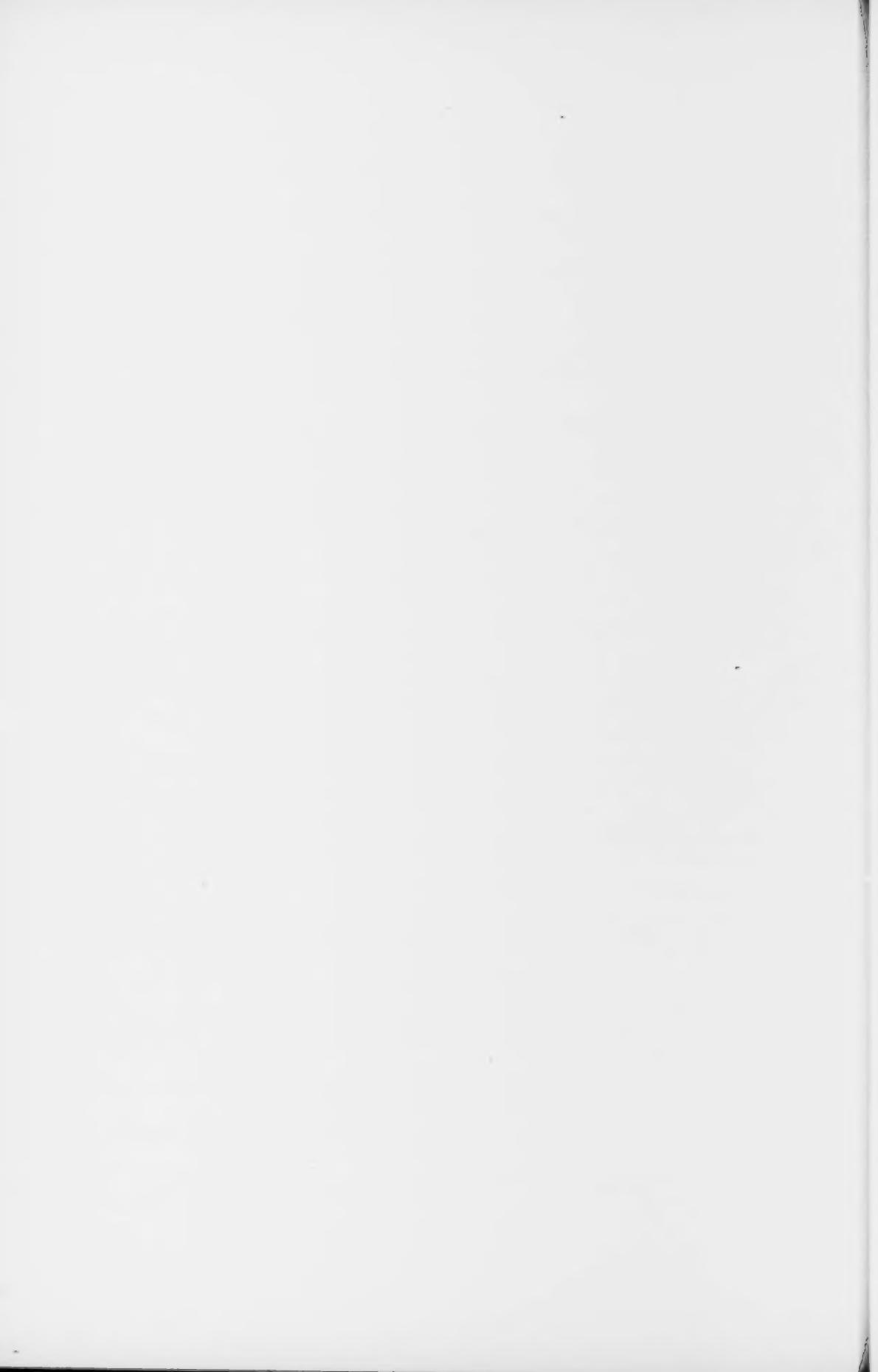
Code of Civil Procedure, Section 1218.

**Limit of Punishment.** Upon the answer and evidence taken, the court or judge must determine whether the person proceeded against is guilty of the contempt charged, and if it be adjudged that he or she is guilty of the contempt, a fine may be imposed on him or her not exceeding one thousand dollars (\$1,000), or he or she may be imprisoned not exceeding five days, or both. -

RULES OF COURT

California Rule of Court No. 26(a):

...Where the appeal is frivolous or taken solely for the purpose of delay or where any party has required...the inclusion of any matter not reasonably material to the determination of the



appeal, or has been guilty of any other unreasonable infraction of the rules governing appeals, the reviewing court may impose upon offending attorneys or parties such penalties, including the withholding or imposing of costs, as the circumstances of the case and the discouragement of like conduct in the future may require.

#### STATEMENT OF THE CASE

This is a case in which Petitioner, a defendant in a quarter-million-dollar lawsuit was immediately inundated with massive and complex discovery and then, only seven months into the lawsuit, and despite his yeoman efforts to respond to the discovery, was sanctioned by the court, the first time it considered the imposition of sanctions, with a "death knell" order precluding him from defending the case on



the merits and from asserting his cross-complaint. The result of this unbelievably harsh sanction was a "slam-dunk" summary judgment imposing liability in excess of \$200,000 as well as the dismissal of a multi-million-dollar cross-complaint.

The "death knell" order, and indeed the discovery bludgeoning which led up to it, are contrary to the most fundamental principles of trial-on-the-merits and of discovery as a tool for truth-finding rather than as an end in itself. The authorities, old and new, castigate such orders as not only abuses of discretion, but as violations of constitutional due process. The trial court, in spite of the earliness of the stage of the proceedings, the enormity of the discovery, the substantial responses given, the absence of any previous violations or sanctions, and the availability of less drastic sanctions



that would have accomplished the legitimate objectives of discovery, seized the first opportunity to slam the door on Petitioner.

Thereafter, Petitioner's motions in the trial court seeking relief from the "death knell" order were denied. Petitioner was further sanctioned in the amount of \$14,500 for having allegedly "frivolously" filed the first motion, and \$13,401 for having filed the second motion.

In summary, the trial court entered the following orders:

- (a) August 29, 1986, requiring Petitioner to pay monetary sanctions in the amount of \$23,030, and which Order included findings which precluded Petitioner defending the case on the merits, asserting his cross-complaint, and ultimately leading up to the summary judgment against the Petitioner both as defendant and cross-complainant in the trial court.



(b) November 20, 1986, the trial court ordered imposition of sanctions on Petitioner in the amount of \$14,500;

(c) December 16, 1986, the trial court, in addition to the monetary sanctions imposed by the trial court, above, the California Court of Appeal imposed and awarded the following sanctions in the following amounts:

(i) Against Petitioner \$113,909 in favor of respondent Young;

(ii) Against Petitioner, \$20,000, to be paid to the Clerk of the California Court of Appeals;

(iii) Against Petitioner's appellate counsel, the aggregate sum of \$5,000 to be paid to respondent YOUNG;

(iv) An additional sanction imposed against Petitioner (contribution) in the amount of \$7,250 ordered paid to a third party, liability for which was "created" by the California Court of



Appeal, reversing the trial court's refusal to make such award or sanction for contribution. No evidence.

FEDERAL QUESTIONS PRESENTED BELOW

Each of the 13 questions listed above under the heading "QUESTIONS PRESENTED" is a federal question. Each and all of questions were raised in Petitioner's Petition for Hearing (Review) in the California Supreme Court, and rejected by that Court, entirely and without exception.

REASONS FOR GRANTING THE WRIT

NOTE: The discussion below is a seriatim presentation of the numbered paragraphs appearing under the heading "QUESTIONS PRESENTED", supra.

1. The California "no cap" frivolous appeal penalty statute and its "no cap" frivolous appeal penalty rule (California



Code of Civil Procedure, Section 907 and  
California Rules of Court, Rule 26(a)  
respectively) are flagrantly and facially  
unconstitutional in denying 14th Amendment  
due process.

The prohibition of "disproportionate  
and no cap penalties" is rooted in the  
Common Law, as condemned in Solem v Helm  
(1983) 463 U.S. 277; and in U.S. v Busher  
(1987) CA 9, 817 F.2d 1409. Since Solem  
and Busher, supra, this Court further has  
opened the door for a 14th Amendment due  
process attack on such "disproportionate  
and no cap penalties", in Browning-Ferris,  
Case No. 88-566, decided June 26, 1989, 57  
U.S.L.W. 4985, 4992.

2. Non-legislative awards, penalties  
and sanctions reveal a deep constitutional  
flaw under the 14th Amendment due process  
clause, as noted by the concurring opinion  
in Browning-Ferris , No. 88-566 (U.S.) June  
26, 1989, 57 U.S.L.W. 4991:



"Several of our decisions indicate that even where a statute sets a range of possible civil damages that may be awarded to a private litigant, the Due Process Clause forbids damages awards that are 'grossly excessive,' Waters-Pierce Oil Co. v Texas, 212 U.S. 86, 111 (1909), or 'so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable', St. Louis, I.M. & S.R. Co. v Williams, 251 U.S. 63, 66-67 (1919). See also South Western Tel. & Tel. Co. v Danaher, 238 U.S. 482, 491 (1915); Missouri Pacific v Humes, 115 U.S. 512, 522-523 (1885). I should think that, if anything, our scrutiny of awards made without the benefit of a legislature's deliberation and



guidance would be less indulgent than our consideration of those that fall within statutory limits." Browning-Ferris, supra.  
(Emphasis added)

3. The Court of Appeal in ordering \$20,00 to be paid to its Clerk violated California Code of Civil Procedure, Section 1218, which limits such award to \$1,000; if that award or order is not violative of Section 1218, it is a capless and disproportionate penalty, and is thus unconstitutional under the due process clause of the 14th Amendment.

The legislature has limited the penalty for civil contempt to five days in jail or \$1,000 fine or both. California Code of Civil Procedure, Section 1218. Bauquess v Paine (1978) 22 C.3d 626, 638. Also see In re McKinney (1968) 70 C.2d 8, 10, 73 CR 580 (monetary limitation mandatory

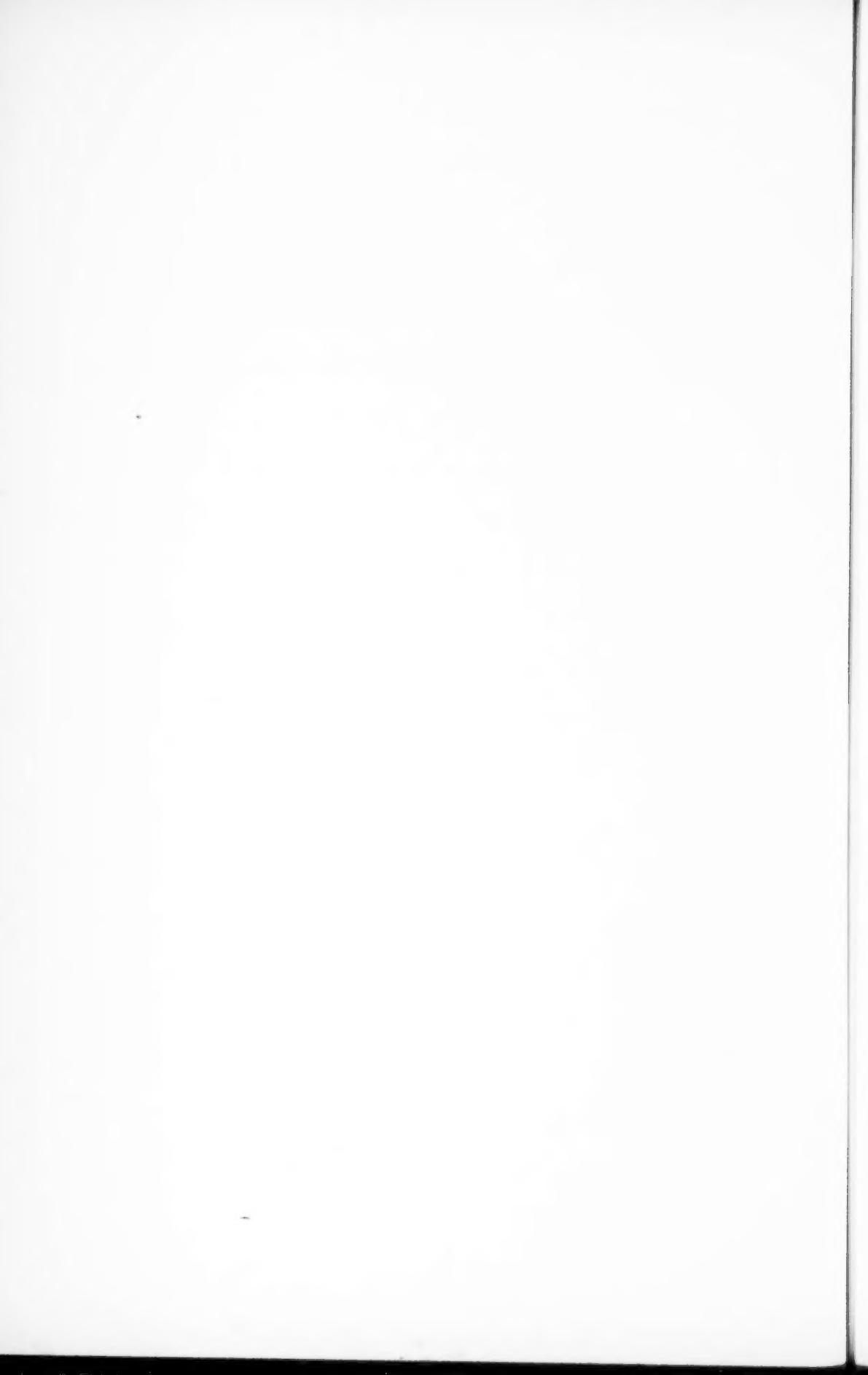


regardless of label).

Disproportionate or capless penalties will not be tolerated because unconstitutional, and will be struck down under the doctrine of due process of the 14th amendment. Browning-Ferris, No. 88-566 decided June 26, 1989 57 U.S.L.W. 4985, 4992, 4993, concurring opinion of Justices Brennan and Marshall.

4. Court of Appeal's consideration of and emphasis placed upon petitioner's alleged bad character, propensities or prior misconduct (all extraneous and unrelated) destroys the integrity of fact-finding and decision-making processes, in violation of the 14th Amendment due process clause. Marshall v United States (1959) 360 U.S. 310; Boyd v U.S. (1892) 142 U.S. 450; Lane v Warden (1963) 320 F.2d 179 (4th Cir.).

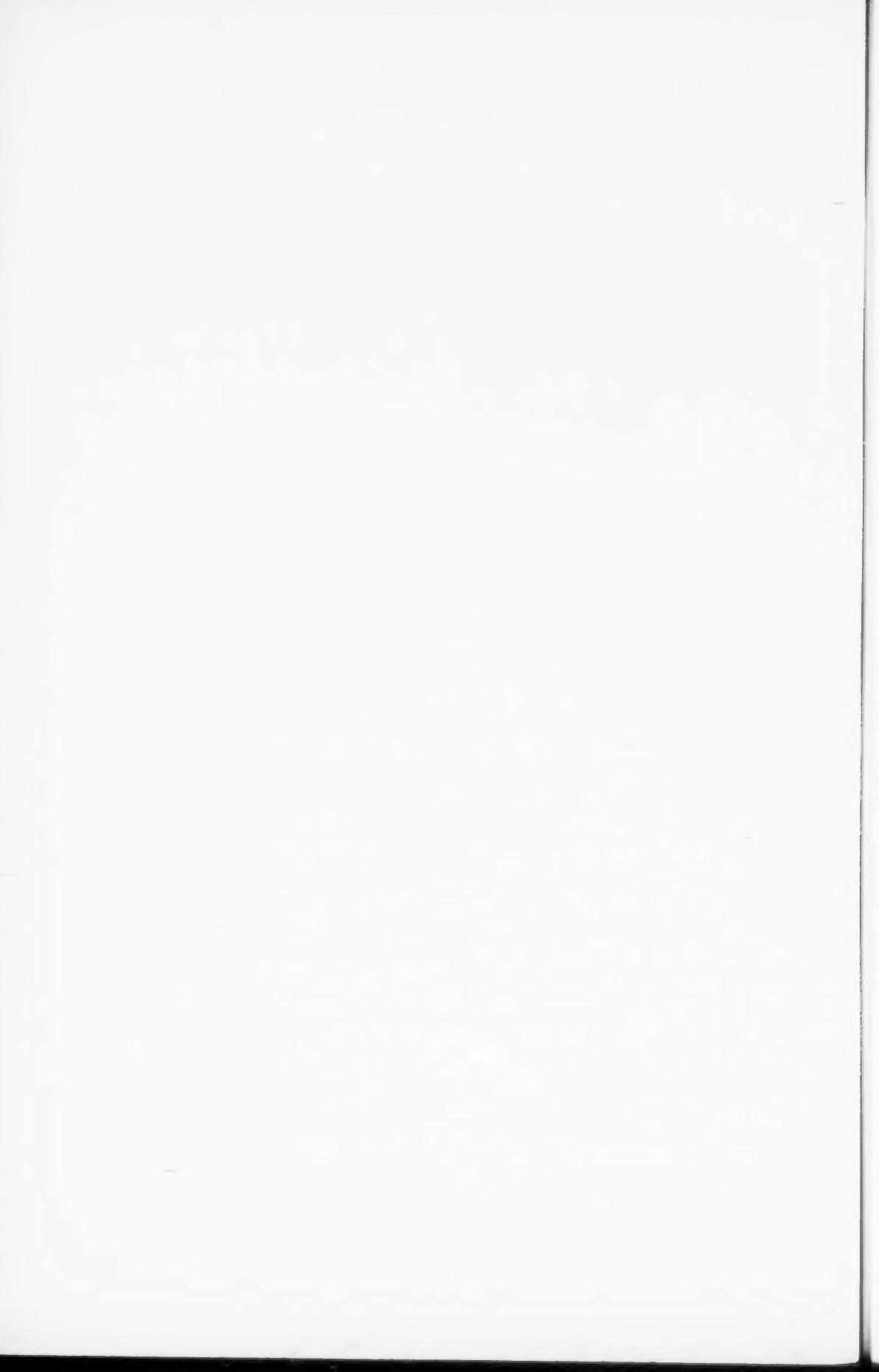
5. None of the parties in the



instant case was a "joint tortfeasor" and there is no "judgment" involved in any way in connection with the subject "contribution" ordered by the Court of Appeal; moreover, CCP Section 882(b) time-requirements have been ignored and not met.

As to this "contribution" award, the trial court specifically rejected Schulte's Motion for Claim of Contribution. The Court of Appeal reversed. Thus, petitioner was not accorded a hearing on the issue of the contribution to the sanctions imposed on "other parties" as required by In re Marriage of Flaherty (1982) 31 C.3d 637, 652, which is a violation of due process clause of 14th Amendment.

6. Petitioner was deprived of his right to a hearing as mandated by California Code of Civil Procedure, Section 2034(a), the statute then in effect



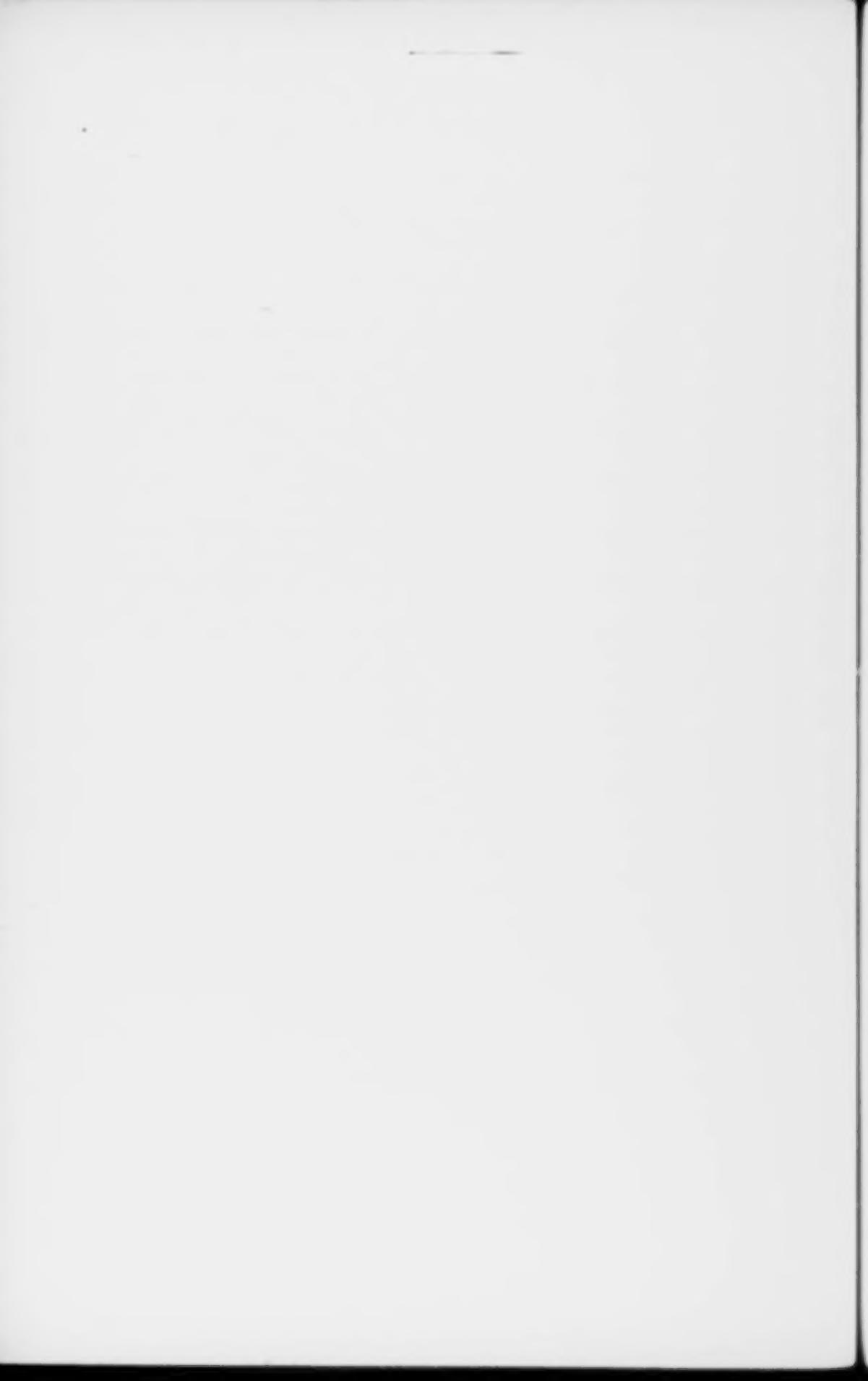
(pertinent period, 1986), because of his attorney's secretly entering into "stipulation", resulting in imposition of the "ultimate sanction", i.e. loss of entire case, and hence petitioner has been denied his right to due process, under the 14th Amendment. Societe Internationale, etc. v Rogers (1958) 357 U.S. 197, 207. Also see Societe Nationale v United States District Court, S.D. Iowa (1987) 107 S.Ct. 2542; Hovey vs. Elliott, 167 U.S. 409, 446; 17 S.Ct. 841, 855: "There is no distinction in principle between determining a cause upon issues not raised by the pleadings in the actual absence of the party, and rendering a decree by refusing to permit a defendant to be heard in his defense or to consider the merits of a sufficient defense, and, indeed, by striking the pleading containing such defense from the files."



7. Attorney does not have, under "general litigation authority", any authority to bind client, without client's specific knowledge, consent and authorization, so as to ultimately deprive client of substantial property interest and of right to evidentiary and meaningful hearing. Court of Appeal, in endorsing such conduct validates instead of voiding ultimate judgment, for deprivation of effective counsel, for violation of due process clause of 14th Amendment, and for violation of 6th Amendment guarantee of effective counsel, rights secured by the Constitution and laws of the nation.

Mitchum v Foster (1972) 407 U.S. 225. All substantial rights of the parties, under controlling federal law, are protected.

Felder v Casey (1988) No. 87-526, 108 S.Ct. 2302; Garrett v Moore-McCormack (1942) 317 U.S. 239.



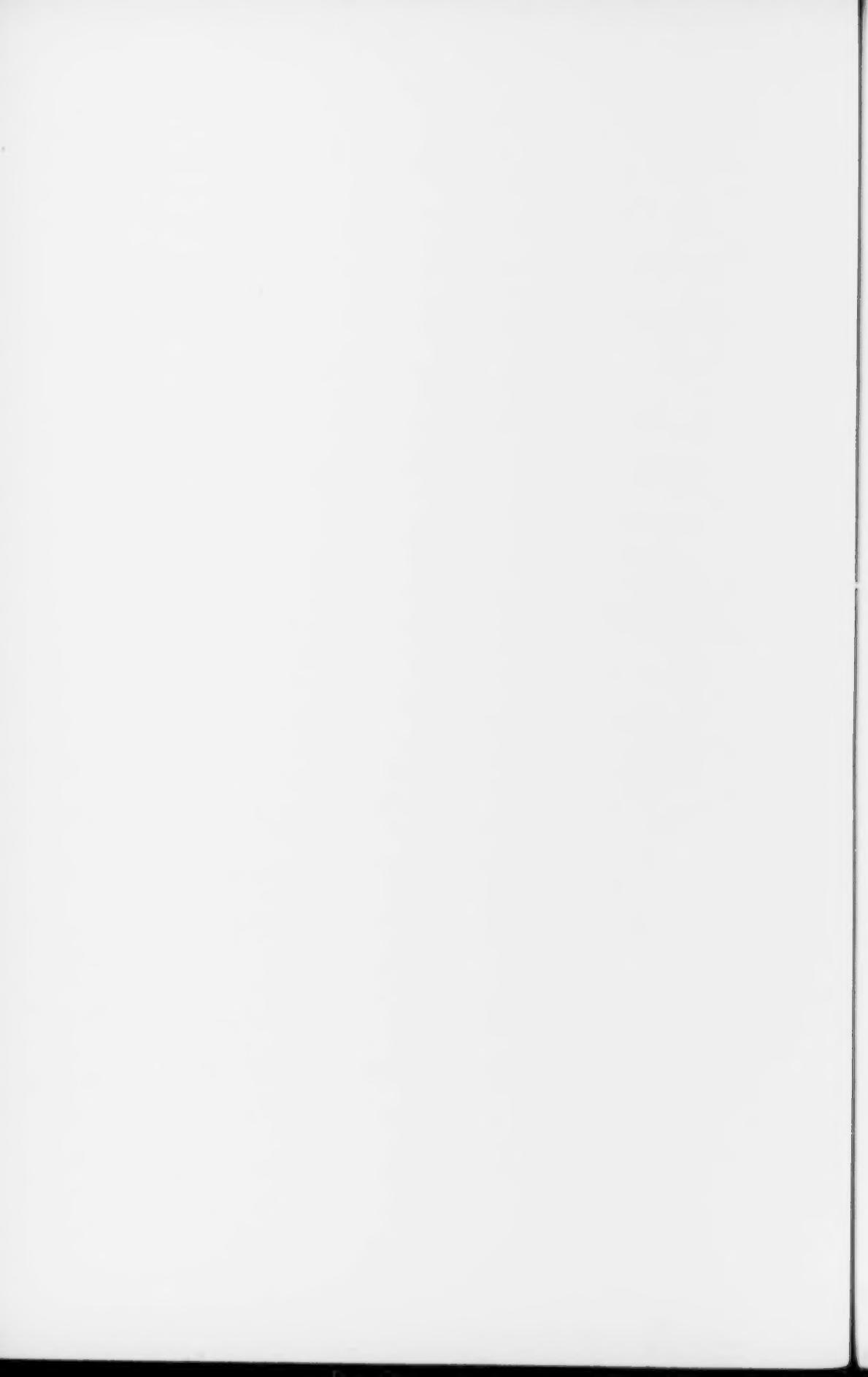
8. A judgment based upon ineffective assistance of counsel is vitiated under the due process clause of the 14th Amendment, considered along with the 6th Amendment guarantee of effective counsel. Such federal rights are expressly guaranteed by the Constitution and laws of the United States. Mitchum v Foster (1972) 407 U.S. 225. Felder v Casey (1988) No. 87-526, 108 S.Ct. 2302.

9. - The Court of Appeal, in marshalling the issues so as to omit the merits of the case as appealed and as briefed, deprives petitioner of due process under the 14th Amendment. Specifically, that deprivation is one which denies to petitioner a fair hearing by a fair tribunal. Marshall v U.S. (1959) 360 U.S. 310; Boyd v U.S. (1892) 142 U.S. 50; Lane v Warden (1963) 320 F.2d 179; 4th Cir.



10. The Court of Appeal acted without any jurisdiction here, since it predicated its determination and disposition on matters which were totally dehors the record. Marshall v U.S. (1959) 360 U.S. 310; Boyd v U.S. (1892) 142 U.S. 450; Lane v Warden (1963) 320 F.2d 179; 4th Cir. Thompson v Louisville (1960) 362 U.S. 199; Gardner v Louisiana (1961) 368 U.S. 157.

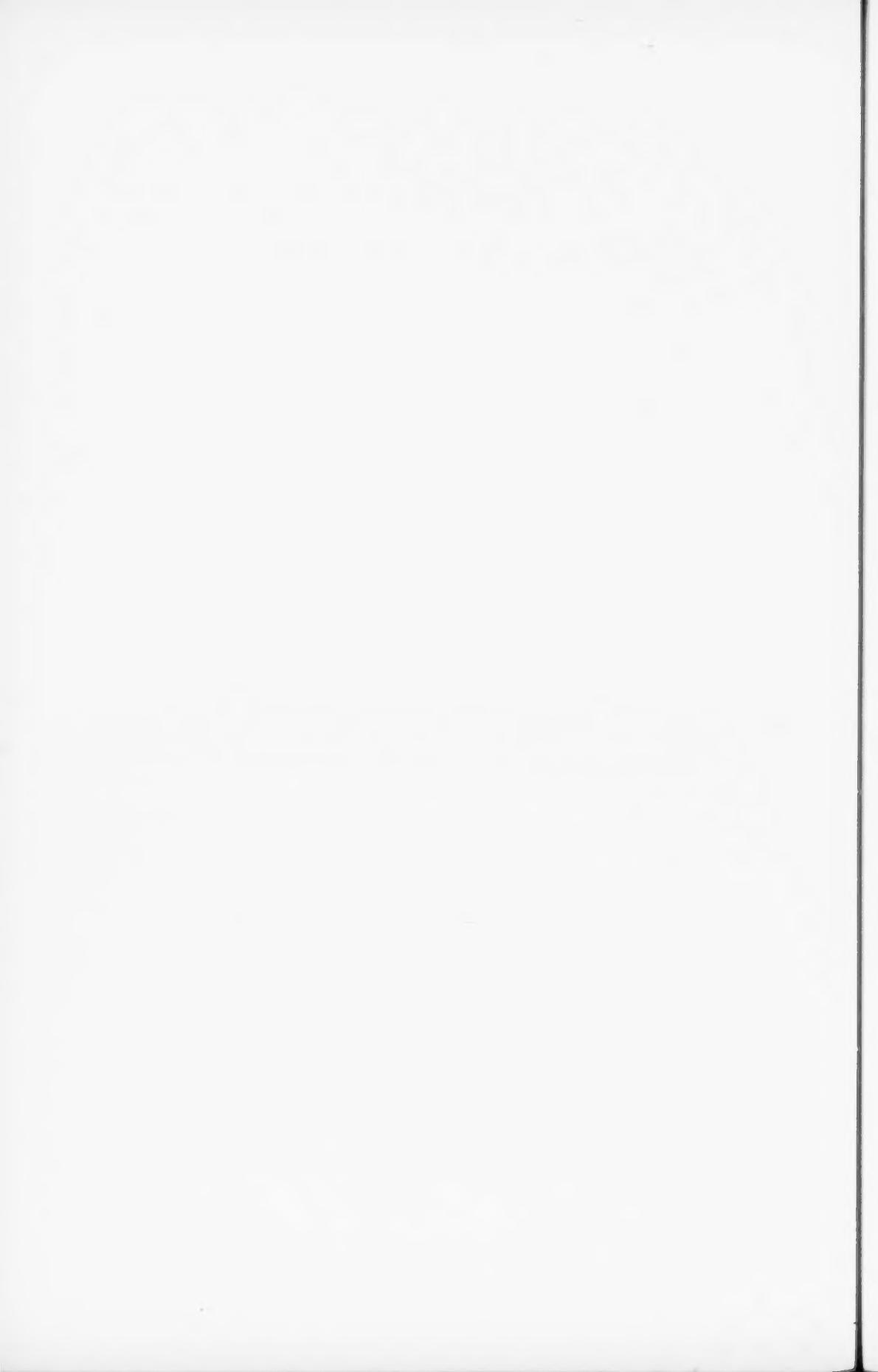
11. The Court of Appeal in substituting its own "tailor-made" ad hoc standard for and in place of the standard established by the California Supreme Court, in Flaherty, infra deprived petitioner of his 14th Amendment due process rights. The action of the Court of Appeal in the instant case, is the very action specifically condemned by the California Supreme Court in Bauquess v Paine (1978) 22 C.3d 626, 150 CR 461; In re marriage of Flaherty (1982) 31 C.3d 637,



12. Where, as here, the Court of Appeal used its own sheer surmise and speculation, without any evidence whatsoever, that attorney services for client (Petitioner) were "valuable legal services", such determination dehors the record is a "no evidence" case, and constitutes deprivation of due process rights under the 14th Amendment.

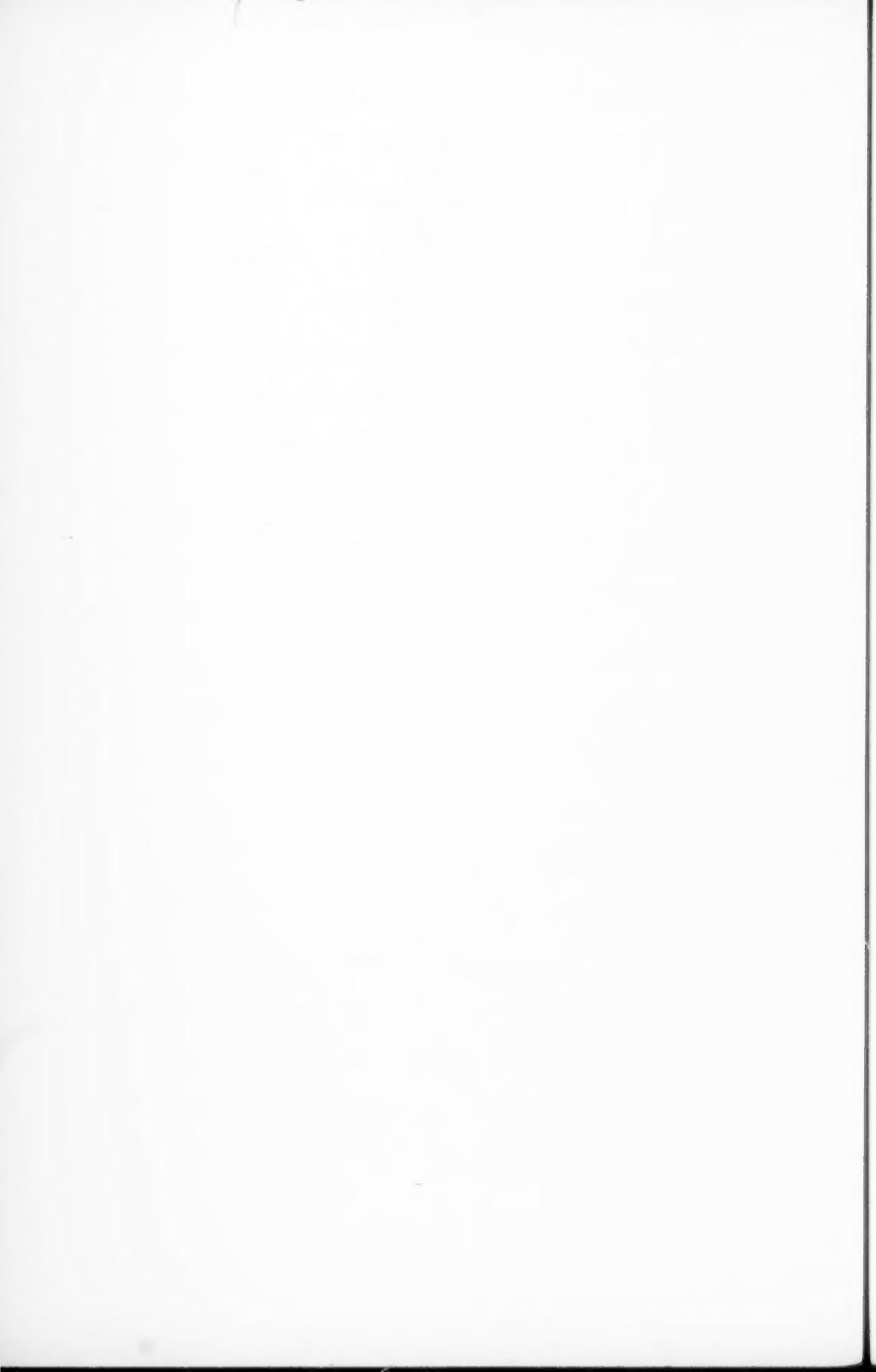
Since there is no support in the record (i.e., no evidence), the opinion and decision of the Court of Appeal is void as a denial of due process rights as guaranteed by the 14th Amendment. Thompson v Louisville (1960) 362 U.S. 199, 206; Gardner v Louisiana (1961) 368 U.S. 157.

13. Deprivation of due process rights on the merits of the underlying case, of court access rights, and of "day in court"



rights under the 14th Amendment due process clause occurred here. In respondent Young's attorney-assignor's generating and churning massive and totally disproportionate, excessive, punitive and confiscatory awards, payable to plaintiff's attorney actually representing a fictitious client (really himself); Court of Appeal's purposeful accommodation and California Supreme Court's endorsement of such scheme, plan, design and objective, i.e. deliberate and repeated seeking of monetary awards via discovery procedures are denials of due process, 14th Amendment.

As this case illustrates, sanction motions can and do distort the actual course of litigation and confound and confuse all concerned. The litigants themselves who wait, and in many cases pay, while the "professionals" fight over "frivolousness" suffer from the over litigation of sanctions question.

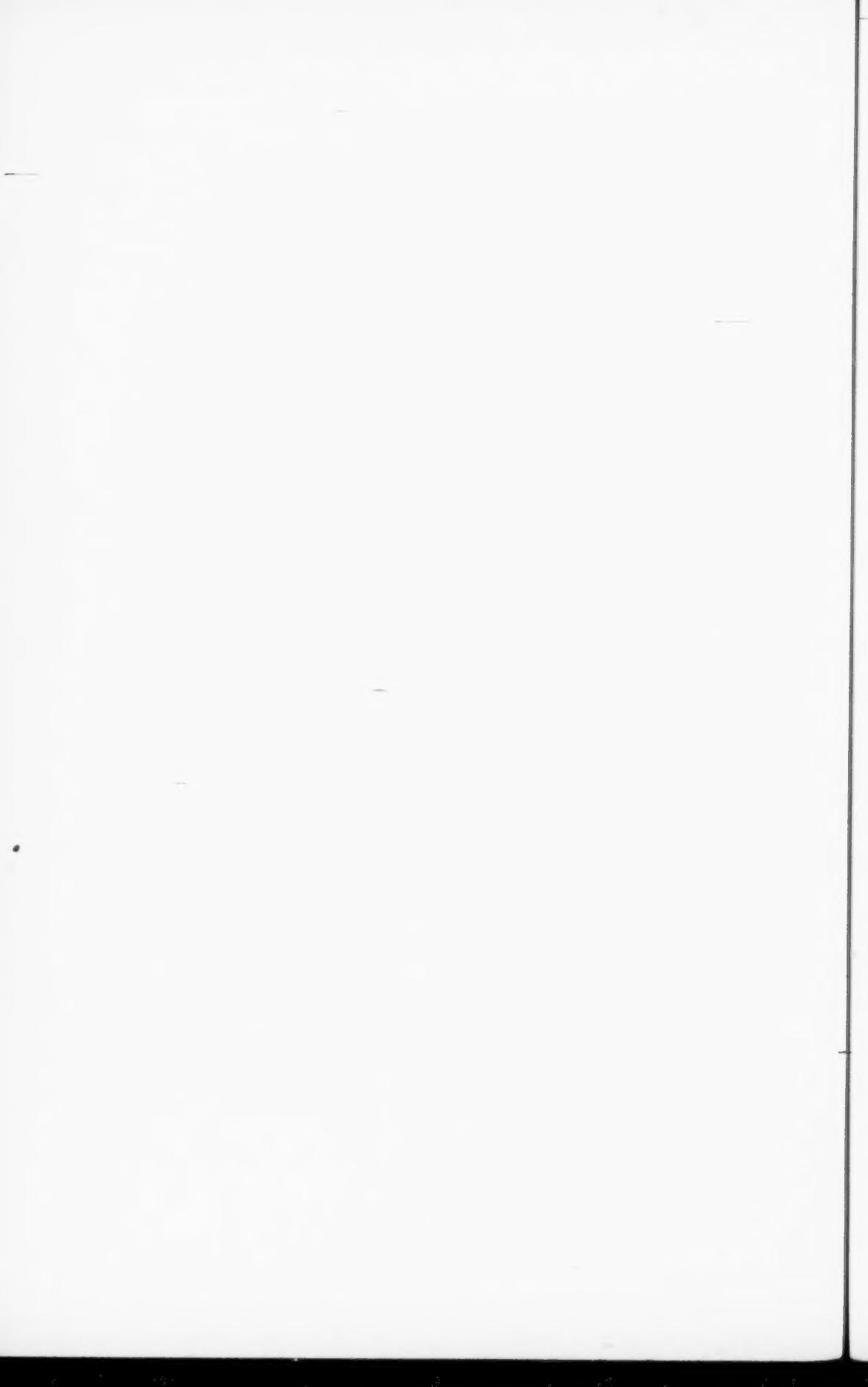


Such deprivation or denial of a fair hearing before a fair and unbiased tribunal is a distinct if not shameful deprivation of due process under the 14th Amendment.

In re Murchison (1955) 349 U.S. 623.

### CONCLUSION

For the particular reasons stated above, which may be otherwise characterized as blatant deprivations and denials by the California Supreme Court of important and fundamental, constitutionally guaranteed rights of Petitioner, the Writ should be granted. The need for the intervention of this Court is indispensable to the rights of Petitioner and the countless litigants similarly situated. Those litigants, without the intervention of this Court, are being denied such fundamental rights as the right of access to the courts, various and multiple rights to due process, rights to



jury trial, rights to civilized and rational limitations on "punishment for infractions". Because of the intransigence and immobility of the California Supreme Court in refusing to entertain the fundamental federal questions presented, Petitioner and countless thousands similarly situated have "no other place to go", except to this Court. With all due respect, the action (or non-action) of the California Supreme Court, as illustrated by this instant case, dangerously approaches tyranny, and is, in sum, a total disregard for the principles established and closely guarded by the decision of this Court.

DATED: 1/7/90.

Respectfully submitted,

  
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LIST OF APPENDICES



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<u>No.</u>	<u>Description</u>
A	October 11, 1989 California Supreme Court Order Denying Review After Judgment By The Court of Appeal
B	Opinion, California Court of Appeal, filed July 18, 1989

(Appendices in accompanying, separate Volume)